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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 236

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INDEPENDENT UNION OF CRAFTSMEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT INDEPENDENT UNION OF CRAFTSMEN.

BENJAMIN WHAM,
Attorney for Independent Union of Craftsmen, Respondent.

December 10, 1940.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

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OPINIONS BELOW.

Judge Kerner and Judge Major in the majority opinion below held that there was no substantial evidence in the Board's findings or in the record that the Independent was a dominated labor organization and should therefore be disestablished (110 F. (2d) 506). Judge Treanor, in a dissenting opinion, concurred and added as an additional reason that a disestablishment order in this case directed against the Independent would frustrate the purposes of the National Labor Relations Act.

QUESTION PRESENTED.

Can an independent union organize and represent the employees in a plant where there was an old Plan and where a few isolated instances of union activity by foremen exist, where there is no evidence that the Independent or its officers are under the control of the company and there is strong evidence that the employees freely chose that labor organization and clear evidence of collective bargaining?

STATEMENT.

FORMATION OF INDEPENDENT.

The Independent Union of Craftsmen was formed after the National Labor Relations Act was declared to apply to manufacturing companies by the decision in the Jones & Laughlin case, decided by the Supreme Court of the United States April 12, 1937. The Independent Union of Craftsmen had no existence prior to that time. The Board would make it appear that it was an outgrowth of the old employees' representation or N. R. A. union in use at the plant previously. There was no connection between the two. After the Supreme Court thus made it clear that the old employees' representation plan was illegal, the majority of the employees formed and joined the Independent Union of Craftsmen, as they were permitted to do by the National Labor Relations Act (N. L. R. B. Sec. 7). Its organization came about in the following manner:

George F. Linde was an assembler and an arc welder at the 39th Street plant (R. 712). He enjoyed considerable popularity among the employees and possessed the qualities of leadership as his subsequent activities will bear out (R. 712, 713).

In September, 1936, Linde observed that the workmen were in a turmoil and there was considerable talk about the C.I.O. which was governed by the Steel Workers Organizing Committee (SWOC) (R. 712). He never served on the Board of the old employees representation plan (R. 713) and he never approved of it because it was composed of representatives of the employer and the employees. He favored a wholly independent union, that is independent from the employer and independent from outside

labor organizers (R. 714, 759). He stated concerning outside unions:

> "* * * in the last ten or fifteen years some of the acts, not in one union, but a greater number of them, were pretty raw." (R. 759-760.)

Linde believed that the employees didn't want to be deprived of the right of governing themselves (R. 714). He believed that the men preferred a union in which they could govern themselves and not be bothered by outside influences.

Linde was approached by Louis Salmons who at that time was interested in the C.I.O. (R. 714). Salmons favored an outside influence governing the men while Linde favored self-government (R. 713). In the words of Linde, he and Salmons branched off like the Y of a road (R. 713).

While waiting for the decision in the Jones & Laughlin case which was then pending in the Supreme Court, the men talked about the advisability of organizing their own union and trying to get the whole membership of the company in such a union so that they could govern themselves (R. 715). When the Act was declared to apply to manufacturing concerns on April 12, 1937, he and some of his friends, Hubert Brucks, John Litster and Arthur Rosenbaum, decided to talk over the matter of organizing a union of their own (R. 715-16). He felt that the sentiment in the shop was strong enough to warrant making the effort (R. 716). They had a knowledge of independent unions at the time through friends of theirs in the steel district who were members of the Steel Employees Independent Labor Organization at Carnegie-Illinois Steel Company in South Chicago, and also through what they had read in the newspapers (R. 716). Linde and Brucks drew up a form of application for membership in the union at the home of Brucks after Litster and Rosenbaum had left on the night of April 12 (R. 716). The following day they had copies made of what they had drafted and during

the course of the day interviewed several employees whom they asked to go along with them and sponsor a list (R. 717). Sheets of paper were prepared, headed and distributed among the men selected and they were told to go to work. Solicitation of various employees took place on the 14th, 15th and 16th of April (R. 717). Linde testified that a few of them were signed during working hours but the great majority of them were signed at noon, in the morning, and the evening (R. 717). Linde further stated that the general attitude of the men was that they all wanted to join. He stated:

> "* * * the great majority of them were signed at noon, in the morning and the evening, * * * It was so big a feature that they were all anxious to get on the band wagon and do something. That was the general attitude." (R. 717-718.)

By Friday evening, about 760 signatures had been obtained and he and Brucks believed that they had enough. They believed that all the signers thought along the same lines as they did and all intended to authorize them (Linde and Brucks) to go ahead with the organization (R. 718). Copies of these lists are in evidence as Intervenor's Exs. 2, 2A and 3A (R. 1420-1439).

On Friday evening, April 16, Linde and Brucks decided that they had to have a lawyer to give advice on the organizational work. They knew that the Steel Employees Independent Labor Organization had a lawyer by the name of Benjamin Wham, and they had seen his name in the newspapers, so they called him and asked for an appointment (R. 718, 719).

They saw him on Saturday morning, April 17, 1937, and explained their situation to him. They talked over the former procedure which had been followed and an arrangement on fees (R. 719). He drew up the proposed constitution which was practically the same as other constitutions he had drawn for other labor organizations (R.

719-20). The names of Brucks, Linde, Rask, Froling, Rosenbaum, Jeske and Litster were set forth as committeemen and Litster, Froling and Linde as delegates. See Board's Ex. 16 (R. 1314-17). It was decided that Linde and Brucks would get the committee together (R. 720). On Saturday afternoon, April 17th, they had contacted the seven named as committeemen in the constitution and they met on Sunday afternoon, April 18th. They had a large majority of employees signed but felt that in order to approach the company they had to have some designated officers (R. 721). Accordingly, they adopted the temporary constitution which constituted the Organizing Committee as the officers and agents of the Union until an election could be had (Board's and Intervenor's Ex. 16, R. 1314-1317).

On Monday, April 19th, the Independent's attorney sent out a form of recognition to be presented to the company by the delegates (R. 721, Intervenor's Ex. 1, R. 1420).

It was submitted to Mr. Berry, the assistant general manager that afternoon. Litster, Froling and Linde attended the first meeting with Berry on Monday, April 19th. At that time Litster said,

> "Mr. Berry we have a list of names here we wish to present to you and ask that you recognize this group of men as the sole bargaining agent of the employees of the Link-Belt Company's 39th Street plant. We have banded ourselves under the name of Independent Union of Craftsmen" (R. 724).

The list, Intervenor's Ex. 2 (R. 1420) consisting of about 760 names, was handed to Berry (R. 724-5). Berry asked if he could have the documents and was told that he couldn't have them but he could look them over. He counted the names and checked against the list of the employees of the company. He checked for an hour and one-half or two hours (R. 725) and said that as yet he did not have authority to sign the recognition agreement, Intervenor's Ex. 1 (R. 1420) and as soon as he got permission

he would advise them (R. 725-6). The committee took the lists and left.

There were between 950 and 1,000 who were eligible for membership in the Union (R. 725).

On Saturday, April 17th, the Independent's attorney had drafted a form of application which he suggested they have printed and signed by the men (R. 727). These cards give authority to the Independent to bargain for the signers (Boards' Ex. 13, R. 1313). They were signed up by the same persons that had signed the lists. In the meantime others had signed the lists (R. 727).

A group of the members advanced some money to print the cards and hire a hall (R. 763).

On Wednesday morning, April 21st, Berry called them into his office and said he was authorized to act as the agent of the Company in this behalf and asked for an inspection of the cards (R. 722).

The committee by this time had already hired a hall for the purpose of holding a meeting and having the attorney explain the purpose and meaning of the constitution and by-laws which they had already had printed for submission to the men (R. 729) and to ratify the acts of the organization committee and to elect permanent officers.

On Thursday, April 22, the Independent Union of Craftsmen held a mass meeting at the Lithuanian Hall, 3133 South Halsted Street, Chicago. The meeting was announced by distribution of small cards and by word of mouth (R. 730). There were about 550 present. There were a few wives of workmen and three or four small children present (R. 731).

Litster presided and the attorney explained the National Labor Relations Act and the proposed constitution of the Union (R. 732). The attorney said that under the decision of the Supreme Court the Company could in no way interfere with, aid or abet the formation of a union and that

it was entirely up to the men as to whom they wished to represent them and how they wished to be represented. He also said that the Company could neither directly nor indirectly finance the Union and that the Union had to stand on its own feet as far as the Company was concerned (R. 733).

Linde was the secretary of the meeting and recorded the proceedings (R. 734).

After the reading of the constitution and the talk by the attorney, a motion was made and passed that the work of the organizing committee be approved and ratified (R. 734). On a rising vote fully 90% of those present stood (R. 734). The resolution was as follows:

> "Resolved that the constitution be and it is hereby ratified, approved and adopted; and the acts of the Organizing Committee are hereby ratified and adopted" (R. 837).

There was a good deal of discussion from the floor. Paul Bozurich and Fred Johnson, members of the C.I.O., were present and conducted themselves in an unruly manner (R. 735). Bozurich "did a lot of hollering and attempted to keep anyone else from talking." Fred Johnson came down the aisle with his coat open, his shirt out, slightly inebriated and hollered at the speakers (R. 791). He was escorted out (R. 1095).

It was decided at the meeting to hold an election of officers on May 4th and that until then the officers and committee which had been carrying on would continue. The resolution adopted was as follows:

> "Resolved that the committeemen and delegates named in the constitution continue to serve in their respective capacities for one month or until a general election can be held by secret ballot for the election of permanent committeemen and delegates."

The recognition agreement was read and discussed, voted upon and approved. The constitution was discussed and adopted (R. 735).

Notices of the Union's election of officers to be held on May 4th were posted on the Union's bulletin boards. Between 400 and 450 attended the election. Litster opened the meeting and called for the election of a temporary chairman. Kresge was elected temporary chairman and Linde was elected temporary secretary (R. 736). Nominations were held and the election conducted by an election committee. The vote was by secret ballot. Rask was elected president of Local No. 1, Kowatch vice president, Conybear secretary, Rosenbaum treasurer, and Linde, Litster and Froling delegates to the general council (R. 737).

The manner of electing shop stewards was agreed upon (R. 737). The various departments were to hold an election at noon or before or after working hours by secret ballot as to who should represent the department as stewards. Thirty-one stewards were thereafter elected in this manner (R. 738).

LEGAL FORM OF INDEPENDENT.

The Independent Union of Craftsmen was incorporated August 3, 1937, under the laws of the State of Illinois. Its objects are set forth in the charter Intervenor's Ex. 6 (R. 1448). Object (h) is as follows:

> "To establish a labor union which shall by its by-laws provide for the organization of lodges in the several plants of said Company with virtual autonomy in local matters" (R. 1449).

The Union was organized with a view of including locals in all of the plants of the Link-Belt Company (R. 728). Up to the time of trial two locals had been established, Local No. 1 at the 39th Street plant with which this cause is now concerned, and Local No. 2 at the Caldwell-Moore plant. It should be pointed out that Local No. 2 at the Caldwell-Moore plant is not involved in this proceeding.

Intervenor's Ex. 4 (R. 1440) are the first by-laws for the general council and Board's-Intervenor's Ex. 16

(R. 1314) is the temporary constitution. Intervenor's Ex. 5 (R. 1444) is a copy of the first by-laws which governed member plants and plant committees.

Intervenor's Ex. 7 are the final by-laws of the Independent Union of Craftsmen which were adopted by the Board of Directors August 9, 1937 (R. 1451) after incorporation. They deal with membership, elections, meetings, quorum, withdrawals, reinstatements, initiation fees, dues, accounting and division, board of directors, collective bargaining, discipline, local charters, boards of stewards, and amendments (R. 1451-56).

INDEPENDENT AS BUSINESS ENTERPRISE.

The Independent Union of Craftsmen keeps minute books and account books (R. 835, 849). The books and records including its minutes and the records of income and disbursements were produced at the hearing and were found to be regular in every respect (R. 835, 849, 856).

The Union has a checking account at the Drexel State Bank; has vouchers for checks; and all cancelled checks are kept (R. 849). It collects dues of 50 cents per month (R. 749). A regular accounting procedure is followed in its money matters (R. 850). Over $3,000 had been collected by the Union from the members of Local No. 1 in the form of fees and dues to the time of trial (R. 749, 850, 854) eleven months after its inception. The Union held dances for its members (R. 852); purchased stationery and supplies including a typewriter; paid lawyer's fees of $1,000 and had arranged to pay an additional sum for representation before the Labor Board and thereafter (R. 749 and 779). The Union has rented and paid for the use of a hall and all other expenses incidental and necessary to the operation of the Union. At least two meetings are held every month, one for the stewards and one for the entire body (R. 749). The meetings are held off Company property (R. 750).

At the time of the trial it was trying to work out a system of insurance and sick benefit for the members (R. 782). It also carried on extensive collective bargaining with the company.

COLLECTIVE BARGAINING.

On May 7 the Union by letter requested a conference to begin negotiations for a contract between the Independent Union and the Company (R. 741).

On May 11 representatives of the Union held another conference with Mr. Berry on the wage question. The demand was for a 10% general increase in wages. Berry stated that the Company was unable to meet the Union's demand (R. 741).

Undaunted by this refusal the representatives of the Union met with Mr. Kauffmann, the president of the Company, on May 19 at the downtown office to carry on negotiations for a general wage increase. Mr. Kauffmann explained that the Company had given the employees a 6% increase on November 2, 1936 and a 10% increase on May 15, 1937. The Company finally agreed to a 5% increase in all hourly rates to be effective on June 1, 1937 (R. 741).

On May 21 representatives of the Union met with the representatives of the Company and submitted a draft of an all inclusive bargaining contract covering wages, hours and working conditions between the Company and the Union (R. 741, 1457). There were negotiations on the subject leading to a contract during the days following May 21 (R. 742).

On June 1, 1937, at a conference held by the representatives of the Union and the Company there was discussion pertaining to seniority which could not be ironed out to the Union's satisfaction. The Union on this occasion went over the head of Mr. Berry and conferred with Mr. Kauffman, the president, Mr. Carter a vice president and

Mr. Burnell a vice president (R. 742-3). The Union's attorney drafted the contracts (R. 743).

The executive committee of the Union was ready to sign the all-inclusive bargaining contract when Mr. Berry was advised by counsel for the Company not to sign the contract. Instead the Company agreed to abide by what had been agreed upon in the written document under an oral understanding (R. 743, 1460).

On August 13 the representatives of the Union and the Company bargained about a bonus payment to be paid to the night workers. The Union felt that extra compensation should be given to those who had to go off their day shifts and work nights. The Company finally agreed to a 5% bonus for the night workers (R. 744).

On September 17 the representatives of the Union and the Company met with reference to a better vacation policy (R. 744) and on October 2 they met for the purposes of negotiating a closed shop (R. 744). On October 8 they met on the question of seniority layoffs.

On October 22 the representatives of the Union again went over the head of Mr. Berry and met with Mr. Kauffmann concerning a closed shop (R. 745). On November 2 the representatives of the Union met with Mr. Berry on the subject of the closed shop and the Company refused to grant it (R. 745).

On November 9 the Union committee met with Mr. Berry on the question of vacations for 1938.

On November 15 the representatives of the Union met with Mr. Berry and discussed the issuance by the Company of a statement of policy which would embody the terms agreed to as set forth in Intervenor's Ex. 9 (R. 745, 1460).

On December 3 representatives of the Union and the Company met with reference to vacations (R. 745).

On December 6 they again met with reference to vaca-

tions and at that time further conferences were held with the Company regarding the issuing of a statement of policy which was issued (R. 745, Intervenor's Ex. 10; R. 1464).

On February 15, 1938 representatives of the Union met with representatives of the Company with reference to vacation pay for men who had been laid off for lack of work or for other causes during 1938. On February 21, 1938 they had another conference on this subject and an agreement was reached that the employees who were laid off in 1938 would be paid the amount of money to which they were entitled in lieu of a vacation (R. 746). Intervenor's Ex. 11 (R. 1467) is a copy of the statement that was issued pursuant to the Independent Union's negotiations on vacations.

On March 3, 1938 representatives of the Union and the Company met and discussed questions concerning work and Independent Union layoffs (R. 746).

As the hearing commenced March 14, 1938 evidence of further negotiations does not appear in the record. However, in addition to these matters several questions of importance to the employees were taken up by the shop stewards with the foremen and heads of the departments and satisfaction was usually obtained from the Company (R. 747). There were questions of vacations, layoffs, seniority, and back pay and several minor matters along with better lighting, better air conditions and safety matters that were the subjects of bargaining. Back pay for a period of nine weeks was obtained for a painter in the crane department.

SUMMARY OF ARGUMENT.

The National Labor Relations Act was designed to protect employees so that they could form and join any type of labor organization they chose. The Independent union was formed exclusively by the employees without the participation of the company in any way. The Independent union has given the employees successful representation in its bargaining with the company. The Board's finding of domination is based on an assumption that the men and women who joined the Independent must have done so because of some "belief" that the Independent was favored by the company. The record and the findings of the Board show that there is no basis for this assumption that the Independent members joined because of any such "belief." The reasons why an individual joins a labor organization is not the test to determine whether that independent was dominated. The test is rather whether the employer forced its employees to join a certain labor organization against their better judgment. That type of coercion, contemplated by the National Labor Relations Act, is absent from this record and from the Board's decision and order. Therefore, there is no evidence that the company has dominated the Independent and an order of disestablishment is improper.

ARGUMENT.

I.

THE PRIMARY PURPOSE OF THE ACT IS TO INSURE REPRESENTATION BY AN UNDOMINATED UNION AND THE RECORD SHOWS THAT THE INDEPENDENT HAS GIVEN THE EMPLOYEES THIS TYPE OF REPRESENTATION.

The primary purpose of the Act set out in its preamble and in section 7 is to insure to employees representation by an undominated labor organization and to permit employees to choose any type of organization they desire. This clearly means that the union must not be subservient to the company and must be freely chosen by its members. In addition the Act, in section 8 (1), prohibits employers from doing anything which interferes with the employees' rights to organize. The Independent, however, is not now interested in what the employer did or did not do except to show that what it did does not prove that the Independent was ever under its control.

Because of the lack of any positive evidence of employer control over the Independent,—such as financial support, use of a company-affiliated attorney, company control over the preparation of the constitution and by-laws, company right to veto by-law changes, or company direction and supervision over the organizers of the Independent,—the Board has found it necessary to invent a basis for its finding of domination. This fabricated basis is: Since there was an old N. R. A. Employees Board, the employees must have been under a "compulsion" during its existence (R. 1525); since the Independent followed the abandonment of the Employees Board, the employees must have "linked" the two together (R. 1534), so that when the employees chose the Independent,

they were under this assumed "compulsion". Therefore it was not their free choice (Board's brief pp. 22-34).

The Board also argues that the 760 employees who joined the Independent had been mentally conditioned against outside unions long before the Independent was ever thought of (R. 1525, 1526), so that when the choice between the two types of unions (*i. e.*, inside or outside) was presented to them, they chose the inside unaffiliated organization rather than the outside "bona fide" union (R. 1534). Finally, the Board concludes, since the employees made this choice, even though it was free from any present employer *coercion*, the company controlled and dominated the Independent and it was thereby rendered incapable of actively and successfully representing its members' bargaining with the company (R. 1534).

This entire argument is based upon one assumption after another, which we will show have no basis in this record or the Board's primary findings of fact and the Board's final step, that because the employees chose an "inside" rather than an "outside" organization therefore the company dominated the inside organization,—is not based upon the meaning of domination that was intended by the Act.

In contrast to this involved theory of the Board, which is no more than an assumption by the Board as to the mental attitude of the employees, the record shows that the Independent has carried out the primary purpose of the Act and has given the employees proper representation by successfully bargaining with the company. The Board refused to consider this evidence on the ground it was not relevant (R. 1534). Its failure, we contend, was an arbitrary refusal to consider the strongest evidence that the Independent is not a "sham" as the Board apparently maintains.

The record shows that on May 7, 1937, the Independ-

ent requested that the company meet with it for bargaining negotiations (R. 1149, 1150, 1414). Thereafter the Independent held many bargaining conferences with Manager Berry, representing the company, and with the executive officers of the company, Mr. Kauffmann, Mr. Carter, and Mr. Burnell (R. 1150). The uncontroverted evidence of the success of this collective bargaining was introduced by the Independent through Linde, the organizer of the Independent, and his testimony appears on pages 740 to 750 of the record. The Independent obtained wage increases after going over Berry's head to Kauffmann, the president of the company (R. 750). The Independent demanded and obtained changes in the seniority policy (R. 742, 743); a bonus payment for night workers (R. 744); a better vacation policy (R. 744); and vacation pay for the men laid off in 1937 (Intervenor's Exhibit 11, R. 746, 1467). The Independent successfully obtained better lighting, better air conditions, and improved safety measures (R. 747), and was unable to obtain only one of its major objectives, which was the closed shop (R. 745).

Thus the Board's finding that the Independent is unable to represent its members is based only on an involved argument that the 760 men and women are unable freely to choose the Independent as their representative because of some "belief" on the employee's part or some "compulsion" caused by no act of the employer at the time of their choice. This finding is made in the face of the unusual success of the Independent in bargaining with the company and the failure of the Board to find one fact that shows that the company directed the development of the Independent or controlled it in the least degree at any time.

We will show that the *findings* of the Board do not show domination of the Independent but instead demonstrate that the Independent was the free choice of the

employees. It is unnecessary to question the validity of any primary finding of fact made by the Board in order to show that the company never dominated the Independent.

II.

THE BOARD'S FINDING OF DOMINATION AND ORDER OF DISESTABLISHMENT IS NOT BASED ON SUBSTANTIAL EVIDENCE.

The Board's chief evidence to show that the Independent is controlled and dominated by the company is that it was organized about the time the old N. R. A. union was abandoned. It contends in its brief (p. 27) that the company could not sit idly by and recognize the Independent although the Independent had a majority and presented adequate proof, but that the company must first take affirmative action designed to notify the employees that it disavowed the old Plan. The Board contends that the company's failure to do this affirmative act is evidence of domination.

One difficulty with the Board's contention is that it places the employees under the power of the company. In other words, the employees could not under this interpretation of the Act organize an independent union, after an old plan had been abandoned, until the company performed this positive act. If the company chose not to do anything, after reading the Act after the Jones & Laughlin decision (301 U. S. 1) which clearly forbids the company from doing anything to influence employee action, the employees, if they wanted an *independent* union, would find it impossible, under the Board's interpretation, to organize one.

A second difficulty with the Board's position is that it assumes that the employees of the company were under some sort of "belief" or "compulsion" which caused them

to join the Independent and that this compulsion should have been removed by an act of the company. This assumption is not a valid one; first, because the history of the organization and development and subsequent bargaining of the Independent show that it was the free and overwhelming choice of the employees, and; second, the invalidity of the Board's assumption can be shown by briefly analyzing the grounds upon which the Board has based its conclusion of domination.

A. The Motives of the Organizers of the Independent Are Immaterial.

The Board in its decision and order contends that since it was "hostility toward the Amalgamated" and not "a genuine desire for self-organization" that was the primary motive for the Independent, the Independent organizers did not "relish the rights of self-organization guaranteed by the Act" (R. 1526-1527). The Board continues by finding that this fact shows that it was evident that the company had implanted upon the minds of the employees its dislike and distrust for outside or "bona fide" unions (R. 1526).

This finding as to the frame of mind of the organizers of the Independent is an arbitrary attempt to attribute domination to the Independent. It is based in part on the testimony of Linde that he knew the meaning of the decision in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (R. 1526), and in part on an innocuous statement of the plant manager in 1936 that did not impress anybody (R. 525, 262). Aside from the fact that this finding does not show that the employees were coerced into joining the Independent against their will, it is based on a fundamental misunderstanding of the Act. The Board's finding that they did not choose a "bona fide" organization must mean that the Board believes that an independent organization is not "bona fide" (R. 1534, 1526). Under the Act, the employees can organize and choose any kind of labor

organization they desire, irrespective of their motives. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Ballston-Stillwater Knitting Co.* v. *N.L.R.B.*, 98 F. (2d) 758, 761 (C. C. A. 2, 1938); *Cupples Company Manufacturers* v. *N.L.R.B.*, 106 F. (2d) 100, 107 (C. C. A. 8, 1939).

In *N.L.R.B.* v. *Swank Products, Inc.*, 108 F. (2d) 872 (C. C. A. 3), Judge Biddle said (p. 875):

> "Because men express dislike to organized labor does not, as the Board suggests in its argument, indicate that they must be acting for the management."

B. The Existence of an Old Plan Did Not Make it Impossible for the Independent to be Organized.

The Board found that since the Independent was recognized only two days after the abandonment of the old Plan, the employees must "by necessity have linked the Independent to the Plan" (R. 1528). This assumption is not evidence that the company dominated the Independent.

If this assumption is accepted as evidence of domination, it would be impossible for men to form a union of their own wherever an N.R.A. plan had previously existed. The evidence shows in this case that the men knew their rights under the Wagner Act to join any union they chose (R. 717, 796, 825), and also that the Independent was a new organization in all its attributes. Although the company may have disregarded the Act until this Court decided *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, both the company and the employees knew its significance. Any retribution against the company should not be visited upon the Independent, which was organized by its members to enjoy their new rights.

The Board fosters the assumption that the situation was exactly the same after the Jones-Laughlin decision as before, whereas it was entirely different. Before the Jones-Laughlin decision it was the general belief that the Wagner Act had no application to unions in manufacturing plants. We are willing to agree with the Labor Board that under

that situation it would be difficult for an independent union to be really independent. However, after the Jones-Laughlin decision it was clear that the Act and the Board apply to these unions. The Independent Union therefore presumably would have the benefit of the Act and the Board's cooperation, as would outside unions, and an independent union so reinforced was now in a position to be really independent.

C. There Was in Fact no Connection Between the Independent and the Old Plan.

The Board in its attempt to connect these two organizations can only find that three out of seven of the first organizers of the Independent were old Plan representatives (R. 1534).[2] The Board maintains that this fact corrupted the Independent.

The Independent was not formed in any way as part of an official act of the old Plan or its representatives. That was the situation in *Westinghouse Electric & Manufacturing Co.* v. *N.L.R.B.*, 112 F. (2d) 657 (C. C. A. 2, 1940), a case so strongly relied upon by the Board in its brief (pp. 27-28). The Independent's organization was spontaneous under the leadership of Linde, a popular employee, who had never been connected with the old Plan (R. 712, 714, 759). If the Board's finding that the activity of three old Plan members as part of a group of 25 to 30 employees who were active in the organization of the Independent[3]

2. The Board states that "the representatives under the Plan were all active in solicitation for the Independent." (R. 1526.) This is incorrect because the Plan had seven members and only Brucks, Lister and Froling took part in the Independent's development (R. 720, 762). Salmons and Lackhouse, Plan representatives, were leaders of the Amalgamated (R. 152, 305).

3. Brucks, Linde, Rask, Froling, Rosenbaum, Jeske and Litster were the committeemen (R. 1315-1316). Three out of the seven were Plan representatives, Rask, president; Kovatch, vice president; Conybear, secretary; and Rosenbaum, treasurer, were the officers of the Independent (R. 737). None were Plan representatives. Walker, Mike, Hack, Conybear, Heyer, Davis, Paulson, Zwart, Boynton, Van Berndandt, Schroeder, Kuehn, Kochinsky, Masilione, Balton, Robinson, Miller, Wilhelm, Ehbert, Monroe, Reidel, Hallet, Ross, Bullard, Fagerstrand, Paldo, Belanger, Steele and Brucks were stewards and active organizers (R. 748). Out of these twenty-nine, one was formerly a Plan representative (R. 1345).

is evidence of domination, the Board will disqualify men who had been previously elected by the men as their representatives, from ever again being their leaders. Men who are natural organizers cannot change over night and refrain from participation in a new movement. The court below properly pointed out that none of the officers of the Independent were old Plan representatives and, furthermore, the leader of the Amalgamated was a Plan representative (R. 152).

D. The Independent Was Properly Organized and Recognized.

The Board found that the Independent organization was concurrent with the decision upholding the Act and applying it to manufacturing plants (R. 1526); that Linde and Brooks drew up application petitions at night, and on April 13, Linde, Brooks and Rosenbaum obtained the aid of other employees to circulate petitions (R. 1527). On Wednesday, April 14, Thursday, April 15, and Friday April 16, solicitation for the Independent took place and 700 men signed up (R. 1527).

The Independent had no lawyer during these three days to counsel it on its activities. After contacting the employees at the Carnegie-Illinois Plants, to learn of their experience in organizing an independent[4] (R. 1527), the Independent leaders employed their lawyer. The following day Linde and Brucks discussed their problem with him, and a constitution and by-laws were drawn up (R. 1527). On April 19, the Independent organization had a clear majority and presented this proof to the plant manager (R. 1527). After first refusing to recognize the union, the plant manager conferred with the officers of the company and two days later granted to the Independent the recognition to which it was entitled (R. 1528).

4. The Independent in the Carnegie-Illinois plants was never recognized by the Company. Instead the C. I. O. was recognized. Obviously that Independent was Independent.

This recitation of the facts concerning the organization of the Independent are the facts set forth by the Board in its decision and order. The findings of the Board show that at no step of the way can it be contended that the company was directing its growth and development.

In addition to the Board's findings, it should be noted that in the eleven months following these first three days of its development, the Independent completed its organization, adopted a constitution and by-laws (R. 1528), elected officers and stewards (R. 736-738), held meetings, all of which were off of company property, held dances (R. 852), collected dues (R. 749) and had over $3,000 in its bank account at the time of the hearing (R. 749, 850, 854), paid all of its own bills, including a $1,000 attorney fee for legal services (R. 749, 779), chartered a second local at the Caldwell Moore Plant (R. 1528) (not involved here), settled grievances, and completed successfully a great deal of collective bargaining with the company (*supra*, p. 11).[5]

In this history of the Independent's development there is only one fact from which the Board attributes domination to the Independent. This fact is the "haste" of the company's recognition (R. 1534). We contend that a two-day delay after the presentation of clear proof of majority is not haste, and that the company did only what the Independent had a right to force it to do under section 8 (5) of the Act. The Board has often held that delay in recognizing a union upon proof of majority is a violation of the Act, *Moltrop Steel Products* 19 N.L.R.B. No. 55. Haste in recognition is only significant when it is used by the company to defeat the claim of majority of a competing union, not present in this case.

The Board cannot seriously contend that the fact that the Independent petitions were hectographed on a company machine shows domination (R. 1527). The evidence

5. This Independent has continued to represent the men for almost four years. It is regrettable that there is no record of the accomplishments of the Independent after the hearing.

clearly shows, and the Board's brief now concedes, that this was done without the permission of the company, after working hours (R. 1040, 1041, 768, 772, Board's brief, p. 15). Likewise, the Board cannot seriously contend that permitting the Independent to have bulletin boards, which were paid for by the Independent, is evidence of domination (R. 1533). This permission was granted after recognition and bargaining therefor and is perfectly proper (R. 866, 1393) as is now conceded by the Board (Board's Brief, p. 22 fn. 19).

The spontaneous approval of the Independent is the best evidence that its members were not under coercion when they chose that organization. Unless there is evidence in the record of mass threats of discharge, the Board's entire argument that 760 members joined the Independent because they were under "compulsion" or were afraid they would lose their jobs is unfounded. No company could force 760 men out of 1,000 to join any organization in three days without mass fear. The Board apparently does not want to understand that 760 men out of 1,000 having the intelligence possessed by the members of the Independent cannot be coerced so easily. Judge Biddle, in *N. L. R. B.* v. *Swank Products, Inc.*, 108 F. (2d) 872, held that the growth of the Independent in that case "was apparently the spontaneous reaction of a group of employees" and that "the Act does not purport to prohibit plant or so-called 'company' unions except where they are linked to the employer," and concluded that "that relationship does not arise from passive acquiescence of the employer, for acquiescence has none of the positive and aggressive quality contemplated by such words as 'interfere', 'restrain', 'coerce', and 'dominate', which we find in the Act."

E. The Intermeddling of a Few Supervisory Employees Did Not Poison the Independent.

As we have stated previously, we are not interested in the activities of the supervisors, unless their activity, as found by the Board, is substantial evidence that the company so dominated and controlled the Independent that the Independent should be destroyed to effectuate the policies of the Act. The Board found that one foreman (Olson) said to one man that he liked independent unions better than outside unions (R. 1529); that one foreman (Siskauskis) assisted several employees to sign Independent applications (R. 1529); that one supervisory employee (Belov) talked to some men in the night shake-out gang about the Independent (R. 1531); that one foreman (Nyberg) said a member of *Amalgamated* could solicit for the *Independent* (R. 1529).[6] The Board also found that after the Independent was organized and recognized two supervisors were present at an Independent members meeting (R. 1528, 1531), and that one employee was hired by the company concurrent with his father's joining the Independent (R. 1532). Since these last two events came *after* the recognition of the Independent they cannot contribute to the Board's theory that the 760 men who joined before the Independent's recognition were under a "compulsion."

The Board made no finding that any of these men threatened anybody with discharge if they failed to join the Independent. Their expressions were expressions of opinion rather than coercion. The Board made no finding that the foremen at the first members meeting participated

6. The Independent does not desire to question the Board's findings on the grounds of credibility, but feels that in justice to its members it should point out to this Court that the findings concerning foreman Olson, foreman Nyberg, and to a large degree the findings concerning foreman Siskauskis, were based on the testimony of one Lackhouse, who, as the Board found, was a member of the Amalgamated at the time that he testified he solicited for the Independent and heard the statements of the above mentioned foremen. The record clearly shows that he feigned sympathy with the Independent at that time in order to destroy it from within.

in any way, that they were invited, or that they stayed over a short time. The Independent should not be penalized for the lack of intelligence, the personal beliefs, or the curiosity of the supervisory force.

In *N. L. R. B.* v. *Swank Products, Inc.*, 108 F. (2d) 872, Judge Biddle said (p. 875):

> "* * * The Board suggests that 'mere attendance of supervisory employees has repeatedly been held to reflect employer interference', but the two cases cited do not go so far."

We agree with the lower court that this is a proper case for a blanket cease and desist order to prevent the company's supervisors from intermeddling with the affairs of its employees. However, our contention is that this intermeddling neither helped nor corrupted the Independent by demonstrating that it was under the control of the company. If one foreman expressed a preference for an independent union or assisted one employee to sign an application card, the entire independent organization would not thereby be corrupted. We contend that the innocuous instances of activities by *four* of the company's supervisory employees before recognition of the Independent do not show that the Independent as an organization was under the employer's control and thereby corrupted. The facts in this case have no similarity to the facts in the *International Association of Machinists* v. *N. L. R. B.* case, which this court decided November 12, 1940. There the supervisors whose activity was relied upon to show that the union was dominated were not merely intermeddlers, but were the organizers and leading spirit of the organization found dominated. Judge Biddle points out the real distinction between this case and other cases where the activity of supervisory employees has been held to show domination. He said in *N. L. R. B.* v. *Swank Products*, 108 F. (2d) 872, at page 876:

> "Our recent discussions in the Titan and Griswold

cases dealt with records which by substantial evidence projected the management *into* the formation of the plant unions." (Italics added.)

The Board found that there was solicitation on company time by the Independent union (R. 1533). Employees as enthusiastic as these employees were will organize wherever they can. The important question is whether the company gained control over the Independent through the fact that some of its organizers obtained some signatures on company time. Such a finding does not show control. In addition, the evidence is clear that the C.I.O. solicited on company time,[7] and this is clearly admitted by the trial examiner when he said, after hearing evidence of solicitation by the Independent and the C.I.O.: "I think the record is pretty clear that it worked both ways" (R. 901).

F. No One Knew About Cousland, the Undercover Reporter.

The Board contends that the fact that the company employed an undercover reporter in the plant until late in 1936 was a factor which showed that the members of the Independent joined because they were under a "settled conviction" or a compulsion of some kind. The entire record shows no evidence that anyone knew of Cousland or that his presence contributed to any such "settled conviction."

III.

CONCLUSION.

There are no findings of the Board which adequately support the contention made in the brief that the employees who joined the Independent in overwhelming numbers

7. Instances of C.I.O. solicitation on company time and instances of warnings to representatives of the Independent by management appear in the Record at the following pages: 662, 760, 780, 781, 800, 803, 816, 818, 819, 822, 826, 827, 829, 830, 832, 857, 862, 868, 871, 872, 873, 880, 881, 889, 894, 895, 900, 904, 810, 913, 816, 917, 918, 921, 928, 1060.

did so because they were under a "belief" or "compulsion", nor do the findings show that they were coerced by the company. What reasons they had for joining the Independent aside from company coercion are immaterial to the issue of company control and domination. The Independent should not be made to suffer because of any acts of intermeddling by supervisory employees.

We therefore agree that a blanket cease and desist order similar to the one enforced by the court below is a proper remedy in this case. However, the remedy of disestablishment imposed by the Board in this case is punitive, as it will destroy the Independent. The Board proposes to destroy the Independent because of certain unimportant happenings in the first three days—this the Board intends to do in the face of the record that shows that the Independent has successfully represented its members from April, 1937, and thereafter. Furthermore, the findings of the Board show that the Independent was never under the control of the company.

The court has the right to determine whether the remedy imposed by the Board effectuates the purposes of the Act, and in this case the remedy of disestablishment would "frustrate" rather than effectuate those purposes. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257; *Consolidated Edison Co.* v. *National Labor Relations Board*, 306 U. S. 197; *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, 250.

This Court, in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, said at page 270:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union * * * even though it had ordered the company to cease unfair labor practices."

This is the precise situation that exists in the case at bar. As Judge Treanor pointed out in his dissenting opinion below, the instances relied upon by the Board to show domination and interference with the Independent amounted at most to only influence rather than coercion.

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court enunciated the policy of the Act (p. 35):

> "Thus in its present application the statute goes no further than to safeguard the right of employees to self organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer."

The court below has prevented an injustice by holding that the Board's order of disestablishment was improper, and protected the Independent by ordering the company to cease and desist all and every kind of interference with the employees as individuals and with the Independent as an entity.

The remedy of disestablishment has only been enforced by this Court in cases where the company had actually coerced the employees into joining the union and had continuing actual or potential control over the organization as an entity. But in the instant case the Board proposes to destroy an independent which is free of the company on an *assumption* without basis in the record or in the findings that the employees had a "settled belief" that the company favored the Independent or that they "linked the Independent to the Plan."

If the Board can collect a series of insignificant events extending over a period of years and draw the inference that the choice of a union by its members made in three days was a coerced choice, although there was no evidence of actual employer coercion, independent unions will cease to exist. The normal relations between the employees and

their supervisors in an industrial plant will supply the Board with sufficient insignificant events to hold any independent union dominated on its finding that the members had a "settled belief" that the company favored one type of union over another.

Until the company has obtained the control of the union and rendered it impotent the Independent has a right to live.

We therefore respectfully pray that the decision of the court below be affirmed in so far as it relates to its refusal to enforce the disestablishment order.

BANJAMIN WHAM,
Attorney for the Independent Union of Craftsmen.

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SUPREME COURT OF THE UNITED STATES.

Nos. 235, 236.—October Term, 1940.

National Labor Relations Board, Petitioner,
235 *vs.*
Link-Belt Company.

National Labor Relations Board, Petitioner,
236 *vs.*
Independent Union of Craftsmen.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 6, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The court below refused to enforce certain portions of an order of the National Labor Relations Board, entered in proceedings[1] under § 10 of the Act (49 Stat. 449), requiring an employer to cease and desist from dominating or interfering with a labor organization and to withdraw recognition from it as a collective bargaining representative of employees; and directing the employer to reinstate or to make whole certain employees[2] against whom the Board found the employer had discriminated because of their union membership and activities. Enforcement of those portions of the order was refused because, in the view of the court below, they were not "supported by evidence" as required by § 10(e) of the Act. The petition for writs of certiorari was granted because of the importance in an orderly administration of the Act of the mandate

[1] These proceedings were instituted on charges filed in 1937 and 1938 by Lodge 1604 of Amalgamated Association of Iron, Steel and Tin Workers of North America, affiliated with the Steel Workers Organizing Committee, and through it with the Committee for Industrial Organization. The complaint, as amended, charged that the employer, respondent in No. 235, had engaged in unfair labor practices within the meaning of § 8(1), (2), and (3) of the Act; 29 U. S. C. § 158(1), (2), and (3). Independent Union of Craftsmen, respondent in No. 236, was allowed to intervene, was represented by counsel and participated throughout the proceedings.

[2] The Board did not sustain the charges that certain other employees had been discharged because of their union activities.

contained in § 10(e) that the findings of the Board as to the facts "if supported by evidence, shall be conclusive." See *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206.

Disestablishment of Independent. Independent Union of Craftsmen was organized within a few days after the decision by this Court, on April 12, 1937, of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, which upheld the constitutionality of the Act. From 1933 down to that date the employer, Link-Belt Co., had maintained a company union, apparently continuing to recognize it even after passage of the Act in 1935 and even though under the Act it was concededly an improper bargaining unit. In any event, that union remained in existence until Independent's membership drive was successfully concluded. The organization of Independent was conceived on April 12 and 13, 1937, by certain employees, who were disappointed at the decision upholding the constitutionality of the Act. Linde, who was a leader in organizing Independent, testified: "A. The Wagner Act had been declared constitutional, and a group of us were dismayed, I am frank to admit, or we thought there was nothing for us to do. Q. Why were you dismayed? A. I will tell you, we had banked our hopes that it would be declared illegal, and immediately the labor unrest and trouble would have stopped and our company would proceed and all the other companies would proceed to enjoy the prosperity which we thought was coming at that time." The membership drive took place in the main on April 14, 15, and 16, resulting in a membership of 760 out of about 1,000 employees. The constitution was drafted on April 17. On April 18, it was decided to seek dissolution of the old company union and recognition of Independent. Accordingly, on April 19 an agreement was reached between the employee representatives and plant manager Berry dissolving the old union; and he was asked to obtain exclusive recognition for Independent. That request was granted by the employer on April 21; and Independent held its first meeting on April 22.

An "inside" union, as well as an "outside" union, may be the product of the right of the employees to self-organization and to collective bargaining "through representatives of their own choosing", guaranteed by § 7 of the Act. The question here is whether the Board was justified in concluding that Independent was not the

result of the employees' free choice because the employer had intruded to impair their freedom.

Respondents point to numerous earmarks of independence which Independent evidences. They emphasize that after it was recognized it held many bargaining conferences and as a result obtained wage increases, changes in seniority policy, bonus payments for night workers, a better vacation policy, better lighting and air conditions, and improved safety measures—in fact, all of its major objectives except a closed shop. They stress the facts that it is not financed by the employer, that its meetings are held off company property, that its leadership is substantially different from the employee representation in the old company union, and that its genesis was a suggestion made not by the employer but by a group of employees.

In the latter connection they urge that the employees chose Independent because that was the type of labor organization which they honestly preferred; or as stated by one of the employees who led the membership drive, "It was so big a feature that they (the employees) were all anxious to get on the band wagon and do something. That was the general attitude." And they maintain that there was in fact no connection between Independent and the old company union; that the success of Independent's membership drive was not the result of any compulsion or belief as respects the employer's attitude.

—ould indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates.

Here no one fact is conclusive. But the whole congeries of facts before the Board supports its findings.

The employer's attitude towards unions is relevant. As we have indicated, it maintained a company union both before and after the Act. And the court below sustained the Board's finding as to the

employer's long-standing industrial espionage, through the National Metal Trades Association, which continued at least until an investigation was made late in 1936 by the LaFollette Committee of the Senate.[3] Further, the employer evidenced hostility towards an "outside" union. In 1936, plant manager Berry told the board of the company union that "in the event outside people came into our plant and told us how to run the plant, then I had enough of industry." At the hearing he testified that he meant "that the Link Belt Company was able and had for many years ran their organization and we did not need outside people to tell us how to run the plant economically and efficiently." In September, 1936, Salmons, an employee of 14 years standing, who was an employee representative in the company union and who became dissatisfied with it, initiated the formation of Amalgamated, an "outside" organization.[4] Amalgamated held its first organizing meeting on September 20, 1936. Salmons was discharged the next day by plant manager Berry for "spreading union propaganda around here." He was given half an hour to leave. The employer does not deny this but adds that Salmons was discharged because he engaged in union activities on company time. That he did solicit on company time seems clear, though it could hardly have been extensive as his foreman testified that he was not aware of it. Yet in his association with the company union, he apparently was allowed a similar freedom. That fact, his position of leadership in Amalgamated, the apparent absence of the customary warning, his somewhat precipitate discharge, the failure of the employer to discharge representatives of Independent who, as we shall see, solicited on company time with the knowledge and approval of at least some of the supervisors, made permissible the Board's conclusion that Salmons' activity on behalf of the "outside" union was the basic cause of his discharge.[5] On September 21, 1936, another employee, Novak, who had been employed by the company for over

[3] Subcommittee of the Committee on Education and Labor, United States Senate, of which Senator Robert M. La Follette, Jr., was Chairman. This Subcommittee acted pursuant to S. Res. 266, 74th Cong., 2d Sess., and held extensive hearings beginning in 1936.

[4] See note 1, *supra*. Amalgamated apparently had about 400 members before Independent started its membership drive in April, 1937.

[5] Salmons was rehired on December 21, 1936, after mediation by the Board on the understanding that he would not engage in union activities on company time.

11 years, was also discharged without warning by Berry, who believed, mistakenly it would seem, that Novak was a member of and solicitor for Amalgamated. Berry gave him half an hour to get out, after charging him with being "an organizer and instigator for a union"—a charge which Novak denied.[6] The Board found and the court below sustained the finding that Novak was discharged in violation of the Act because of his alleged union activities. We agree.

Amalgamated, as well as Independent, solicited on company time. But a review of the record indicates that the instances of solicitation by Amalgamated on company time were scattered over a period of months and were apparently more sporadic than those of Independent. At least they do not appear to have had the magnitude and intensity of the acts of solicitation on company time by Independent. There is considerable testimony by members of the supervisory staff that they were instructed not to take sides in the union competition and not to allow solicitation on company time. Plant manager Berry testified on direct examination that those instructions were given after April 12, 1937; and on cross-examination he admitted that they were given only after April 19, 1937, at which time Independent had acquired a membership of 760 men. It is argued here that the employer warned solicitors for Independent and threatened them with dismissal for engaging in union activities on the company's time. And Froling, chairman of the company union and active solicitor for Independent, testified that he was wary about soliciting in the plant on company time in front of foremen, for although he did not remember any foreman warning him, he nevertheless was afraid of being discharged because of what had happened to Salmons on account of his activities. It is therefore contended that no discrimination in favor of Independent can be inferred; that the quick success of Independent in obtaining a majority was due not to the employer's support but to the employees'

[6] Novak was reinstated in January, 1937, with the understanding that he would not engage in union activities on company time. According to him, the condition extended to union activities at all times. According to the company, it covered only union activities on company time. The Board did not resolve the conflict but noted that Novak as a result of his understanding, did not join Amalgamated until after the Act had been upheld in April, 1937. Novak delayed accepting the proposal of reinstatement because of the possible implication that thereby he would tacitly admit that he had earlier engaged in union activities.

enthusiasm for that union. The Board stresses the fact that employee representatives in the company union were extremely active solicitors for Independent. It points out that at least six of the employee representatives under the company union were active solicitors—Froling virtually admitting that he solicited the entire machine shop—110 to 120 men—during working hours. Kowatch, an employee, signed up between 100 and 250 men, about one-fourth on company time and twice punched out his time with the permission of the foreman to solicit in the foundry. The company counters with the fact that there were many solicitors for Independent of whom those representatives were a mere minority—less than a third. There is this to be said, however, about those conflicting claims. Most of the company union representatives were active and prominent in Independent's membership drive and during that drive apparently enjoyed somewhat the same privilege of moving freely about the plant which they had been allowed as company union representatives—a privilege withdrawn after Independent had been recognized. The instances when supervisors remonstrated with solicitors for Independent seem to be restricted to around six or seven in number, and some of those related to activities *after* the April membership drive was completed. As respects one of the latter instances, Linde, an employee soliciting for Independent, stated that foremen warned the men: "You are on union business. My God, don't let me catch you or we will fire you, or words to that effect." But, as the Board concluded, it seems impossible to infer that, in view of the extensive and intensive solicitation for Independent in the plant on company time, the supervisory staff were not aware of the campaign and did not acquiesce in it. Beyond that is the active support of Independent by some of the supervisory staff. There is abundant testimony that Siskauskis, a foreman, actively solicited for Independent. One employee, Lackhouse, who earlier had joined Amalgamated but who was soliciting for Independent in April, 1937, testified:

"He took the sheets in my hand—the first sheet I had already filled, with the heading on it, and I had nothing but blank sheets left, and he went around the machines, the molders right off the side floor there, and he told them to sign up the Inside union here, and he signed up I believe ten, and about five of them he signed up in his own handwriting. The majority of them in the foundry don't know how to write. Q. And did you see him sign up these other

men? A. I seen him sign up actually about seven or eight, I am sure, in his own handwriting. He went as far as one crane man who was working right above him, and he was going up to him and he was going to explain what it was all about, and he says, 'Oh, heck, he don't know how to write,' so he wrote down his name, too. I don't remember his name, I know it was John, the crane man in his department. I just don't know his last name. Q. And then did Mr. Shaskinskis (sic) give you back the paper? A. Yes, he returned them back to me after he had the names on them."

This episode was confirmed at least in part by Johnson, an employee.

Another employee, Balcauski, testified as follows respecting Siskauskis' solicitation:

"He walked to me and he said, 'Stanley, why don't you join in the C. I. O.'—I mean this here, the independent craftsmen's union. I said, 'I am already with the C. I. O.' He says, 'The hell with the C. I. O.' He says, 'Join in with the craftsmen's union.' He says, 'We are going to have our union.' Then I repeated, I says, 'Do you know under the Wagner Law that is not allowed for the foreman to go and organize the working men on the company time or on his own time?' He told me this, he said, 'To hell with that.' So I says, 'If you want to sign up independent, go ahead, I ain't going to waste my time.' And I walked away."

Balcauski further testified respecting Siskauskis' solicitation of employees: "He told them, 'If you don't sign up'—I heard it with my own ears—he said, 'you are going to get out of here.'"

Still another employee, Thomas, testified:

"Q. Did anybody ask you to join the Independent Union? A. Everybody, Splitz (Siskauskis) comes to me with piece of paper, sign your name. I say I can't sign my name. He says, 'All right, I sign it myself.' And he signed it himself, my name. Q. Did he say anything more to you about it? A. That is all that day. The second day he come around again. He say, 'Joe, sign name.' I say, 'I sign yesterday.' He say, 'All right, it is no good, I threw it away.' Q. It is no good, he threw it away? A. Sure. I didn't sign no place. 'Joe,' he say, 'Sign him up anyhow, or maybe lose job.' Q. Splitz says to sign up or maybe you lose job? A. Yes. I says, 'I sign him up if you want to.' He come in Thursday about this piece of paper again and he say, 'Joe, sign name.' I say, 'What is the matter, I sign him up twice, I sign him up before yesterday and I sign him again.' He say, 'Something wrong, no good.' I say, 'I quit, I don't want sign at all.' Q. You didn't want to sign? A. No. Q. You didn't sign either day? A. I don't sign. At noontime he come to me and he say—I was by him over there and he

say, 'Come on, Joe, come in office sometime, we want to see you'. Q. Did you go in the office? A. Yes. . . . Q. Some man with a mustache was sitting there? A. Yes, sir. He say, 'What you want?' I say, 'Splitz sent me in office, you want something?' He said he didn't want nothing from me. Splitz come in then and grabbed my hand, and he say, 'Give him piece of paper'. He say, 'sign his name.' I can't sign name, I say I will not sign. I said two times I sign, I don't like it. He say, 'Sign anyhow.' Q. Who said that? A. Splitz, 'Go ahead, sign again.' I say, 'I am going out, go to work.' Q. You did not sign? A. No. A couple of times he come to me and say, 'Sign them up.' I don't sign no place. A lot of people don't sign, I no sign.''

Bozurich, an employee, testified as follows with respect to the attitude of Siskauskis towards Amalgamated:

" . . . then he went on with remarks that it would be very bad if C. I. O. would come into the shop. And I said, 'What would be bad about it?' I said, 'If the workers want it who can stop them?' 'Well,' he said, 'if C. I. O. comes in the company will close the plant.' He said, 'You see during the depression it was hard to be without a job.' I said, 'Company can't lock—close the shop because of the union.' I says, 'That would be considered as a lockout.' And he said, 'Who can stop them?' 'Well,' I said, 'the government.' He said, 'The company runs the plant and not the government.' I said, 'There is such a thing as government Labor Board here who takes care of those members,' and I believe I referred him to—well, to be exact, I read in the paper about a certain company somewhere in New York or New Jersey that due to C. I. O. activities closed their plant and moved the machinery out, things like that, to get away from the union. So I call his attention to that, to the best of my recollection from the newspaper, that the Labor Board takes action; they got company to put machinery back. At least that is the way I understood it so the illustration to him is that we are not afraid of that kind. Then he twisted his lips and said 'Oh,' he says, 'you better keep away from something like that,' he says, 'and if you want anything it is best to go to boss yourself.' ''

There is also testimony that Siskauskis signed for illiterate employees, though, with one possible exception, apparently not against their will. Siskauskis denied that he made any such statements or that he ever solicited for Independent. The Board refused to believe that all the opposing testimony was fabricated, and found his denials unconvincing.

Lackhouse, an employee, testified that he obtained permission from Nyberg, his foreman, to solicit for Independent, Nyberg say-

ing, "Well, if you have to, you have to, Frank, so you might as well go ahead on it." Lackhouse was delayed about half an hour in getting started when Olson, an assistant superintendent, took him aside in a separate room and, according to Lackhouse, "compared the differences between the outside union and the inside union; and he told me about it up there, how much better off we would be if we organized amongst us fellows, among our fellow workmen ourselves and kept the outside union out, that you will never get anywhere with them, just striking all the time, and give me the differences, and I listened to him about it." Lackhouse testified that thereupon he solicited in the plant during working hours: "I was absent from my job from one o'clock until quitting time walking through the whole foundry." On direct examination Olson denied this conversation. On cross-examination he admitted talking briefly with Lackhouse about "a rumor that the boys are trying to form an independent union." Nyberg was not called. The Board believed Lackhouse.

There was considerable testimony, not denied, that Belov, a night boss, also solicited for Independent. According to one employee, Kalamarie, Belov did so on written instructions left by foreman McKinney which Kalamarie read. Kalamarie testified as follows respecting this conversation with Belov about those instructions:

"Q. So when he (Belov) got this note to solicit for the Independent Union he was a little bit puzzled by it and he asked your advice about it? A. He did. Q. You advised him that inasmuch as his superior officer, Mr. McKinney, had ordered him to do it, he had better go ahead and do it? A. That is right, if he wanted to keep his job, I imagine he should."

McKinney denied that he had left any such instructions, though it apparently was his custom to leave written instructions for the night bosses on things he wanted done. Belov was not called. Because of that and because of the contradictory character of McKinney's testimony on certain matters, the Board believed Kalamarie.

Tomas, an employee, testified that his boss, Big Louie, "a kind of assistant foreman," solicited for Independent getting about ten signatures; that Big Louie told him that "they were trying to get the C. I. O. out of there."

The court below was unable to find any evidence from which it could be inferred that the employees did not, with complete inde-

pendence and freedom from domination, interference or support of the employer, form their own union. But we are of the opinion that the Court of Appeals in reaching that conclusion substituted its judgment on disputed facts for the Board's judgment—a power which has been denied it by the Congress. Sec. 10(e) provides that the "findings of the Board as to the facts, if supported by evidence, shall be conclusive." As we stated in *National Labor Relations Board* v. *Waterman Steamship Corp.*, *supra*, at pp. 208-209: "... Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act." Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461. The Board, like other expert agencies dealing with specialized fields (see *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304) has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony.

The Board had the right to believe that the maintenance of the company union down to the date when Independent's membership drive was completed was not a mere coincidence. The circumstantial evidence makes credible the finding that complete freedom of choice on the part of the employees was effectively forestalled by maintenance of the company union by the employer until its abandonment would coincide with the recognition of Independent. The declared hostility towards an "outside" union, the long practice of industrial espionage, the quick recognition of Independent, the support given Independent's membership drive by some of the supervisory staff, the prominence of company union representatives in that drive, the failure of the employer to wipe the slate clean and announce that the employees had a free choice, the belated instructions to the supervisory staff not to interfere—all corroborate the conclusion

that the employer facilitated and aided the substitution of the union, which it preferred, for its old company union. But respondents contend that there is no evidence that the employees had a settled conviction that the employer preferred a certain type of labor organization or that they were under compulsion from the employer in choosing between Independent and Amalgamated. There were, however, forces at work in the plant which make tenable the conclusion of the Board that the employer had intruded so as effectively to restrain the employees' choice. The employer's attitude towards an "outside" union coupled with the discharge of Salmons and Novak for activities on behalf of Amalgamated would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated. That the discrimination against Salmons had some effect is not denied, for Froling, a witness for Independent, insisted that even he furtively solicited for Independent because of the price paid by Salmons. When that discrimination is contrasted to the apparent acquiescence by the management in the open solicitation by Independent, we cannot say that the Board was unjustified in the conclusion which it drew. As we stated in *International Association of Machinists* v. *National Labor Relations Board;* decided Nov. 12, 1940, "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. As we indicated in *International Association of Machinists* v. *National Labor Relations Board, supra,* the strict rules of *respondeat superior* are not applicable to such a situation. If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere. If the employees "would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice

which the Act contemplates." *International Association of Machinists* v. *National Labor Relations Board, supra.* Here such inferences were wholly justified. The attitude of the employer towards an "outside" organization was clearly conveyed. When that was followed by solicitation for Independent on the part of supervisors who had general authority over the men, it would be unfair to conclude that the employees did not feel an actual pressure from the management. That fact, the failure of the employer to announce its impartiality, its delay in advising the supervisors to remain neutral until Independent had acquired its majority, the favors shown Independent, the discharge of Salmons and Novak, its past union policy, all are part of the imponderables which the Board was entitled to appraise. The fact that these various forces at work were subtle rather than direct does not mean that they were nonetheless effective. Intimations of an employer's preferenee, though subtle, may be as potent as outright threats of discharge.

Respondents suggest that an order of disestablishment would make Independent an innocent victim of the employer's inaction or of its unwelcome action. It is urged that the subsequent conduct of Independent demonstrates its independence and that an order directing the employer to cease and desist all interference with the employees and with Independent is wholly adequate for the evil at hand. The Board, however, was not forced to conclude that the subsequent activities of Independent erased the effects of the employer's earlier discrimination, any more than if was compelled to believe that the employer's later show of impartiality obliterated the consequences of its prior interference with the employees' freedom of choice. We cannot assume that the employees will be free from improper restraints and will have the complete freedom of choice which the Act contemplates where the effect of the unfair labor practice is not completely dissipated. The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., supra; National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *International Association of Machinists* v. *National Labor Relations Board, supra.*

The order of disestablishment must be enforced.

Discharges of Employees. The court below rejected the finding of the Board that Salmons had been discharged in violation of

§ 8(1) and (3) of the Act. For the reasons already stated, we think that the court erred and that the Board was right.[7]

The Board found that in April, 1937, employment manager Staskey conditioned the employment of Frank Solinko upon the acceptance of membership in the Independent by his father, Pete Solinko; and that therefore the company had violated § 8(3) of the Act.[8] The Board credited the testimony of Pete and Frank Solinko against testimony of Staskey and an employee named Kowatch. Kowatch was a solicitor for Independent whom Pete Solinko said Staskey had told him to see. Pete, a member of Amalgamated, joined Independent. So did Frank, who later, however, joined Amalgamated. The evidence is somewhat confusing. But even according to Staskey, Pete Solinko did show him an Independent card the day Frank was hired. The court below noted that even if the testimony of Pete were true, the conversation occurred two months before Frank was hired; and even if it took place on the day he was hired, then it was after Independent had been recognized by the company as the bargaining agent for the employees. We think, however, that the Board's finding was justified. Whenever the conversation took place, the conditioning of Frank's employment upon Pete's joining Independent was a violation of § 8(3) of the Act in absence of a valid closed-shop agreement, not present here. Viewed in that light, it also corroborates the conclusion of the Board that the employer interfered with the collective bargaining process by supporting Independent, though the episode took place after Independent's membership drive was completed.

Karbol and Cumorich were discharged May 19, 1937. In April, 1937, Belov, according to their testimony, had asked them to join Independent. They refused. In the latter part of April, 1937, they joined Amalgamated. The company's claim is that they were discharged for unsatisfactory work after time studies had shown their inefficiency and after the day foreman, McKinney, had warned them that their work was not satisfactory. On the other hand, they denied that anyone had given them any such warning or had criti-

[7] The Board ordered no affirmative relief with respect to Salmons as he had been reinstated under an agreement with the company that he would not receive back pay.

[8] No affirmative relief was ordered as respects Pete Solinko, who was laid off in January, 1938.

cized their work; they testified that at the time of their discharge Belov stated that they were good workmen and that he did not know why they were discharged. The Board reviewed the time studies and found they did not reveal with any degree of precision the relative efficiency of the men. It concluded that they were discharged because they joined Amalgamated. The evidence as to ineffieiency is quite inconclusive. The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew these men had joined Amalgamated and was displeased or wanted to make an example of them.

The court below also refused to enforce the Board's order reinstating and making whole Kalamarie who was discharged according to the Board because of his union activities. He, like Karbol and Cumorich, did not accede to the solicitation of Belov on behalf of Independent. He had joined Amalgamated in March, 1937, was an active solicitor for it, and served on its grievance committee. As a member of that committee, he called on plant manager Berry to protest the lay-off of a union man. Shortly thereafter, Belov, Kalamarie's night boss, received instructions from the day foreman to lay Kalamarie off for a week if his work did not improve. November 30, 1937, he was permanently laid off for an alleged lack of work as a welder and in connection with a general reduction of employees. Until his promotion as a welder a few months earlier Kalamarie for some time had been an acetylene burner. He testified that when he took the job as welder, he was promised that he could go back to burning without loss of his seniority rights if welding ran out. This was denied by the foreman. When he was laid off, men junior to him as burners were retained. He protested. The company insists that the refusal to restore Kalamarie to his old position as burner was consistent with its occupational seniority policy. On this there is some contradiction in the record. There is testimony that under company practice an employee retained (or at least might be given) his original seniority if he was promoted to another position in the same department. The reasons stated for not restoring Kalamarie to his old seniority position were that he did not ask to be put back and that the company would have had to lay off a burner senior to him. These statements were contrary to the facts

as found by the Board. On this state of the record we think that the Board was justified in concluding that Kalamarie was in fact discharged because of his activities for Amalgamated.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals with directions to enforce the Board's order in full.

Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END